FOR THE NINTH CIRCUIT

JOHN W. WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

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IN THE

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I

STATEMENT OF THE CASE

On September 27, 1962, appellant was convicted on a one count indictment, in which he was charged with a violation of Section 912 of Title 18, United States Code, in that he falsely pretended to be an officer and employee of the United States and in such pretended character did obtain a thing of value. On October 5, 1962, His Honor, Judge WILLIAM C. MATHES, committed appellant to the custody of the Attorney General for imprisonment for a period of three years, suspended execution of the sentence and placed appellant upon probation for a period of five years.

II

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT

Appellant was employed by a corporation known as the National Bureau of Investigation, which company name had been used for the past 27 years, and which was registered in the County of Los Angeles, State of California, (Reporter's Transcript - R.T. p. 164, lines 11 to 25). He was employed by said corporation for a period of seven to ten years (R.T. p. 170, lines 1 to 5). That the employees of said corporation, including the appellant, used an identification card, Government Exhibit No. 1, since 1935 (R.T. p. 166, lines 19 to 22). Also, said employees were compelled to carry a badge bearing the name National Bureau of Investigation (R.T. p. 167, lines 11 to 17).

On or about March 13, 1962, appellant contacted Mr. and Mrs. Reedy (prosecution witness), to ascertain the whereabouts of Mrs. Reedy's father. Appellant purportedly showed Mr. Reedy an identification card, bearing the name Federal Bureau of Investigation. That appellant at no time represented orally that he was from the Federal Bureau of Investigation (R.T. p. 73, lines 16-17). The evidence is insufficient to sustain the verdict in the instant case. The only witness from whom the only bit of testimony that the prosecution presented, was Mr. Reedy, who stated that he saw appellant's identification card, bearing the words Federal Bureau of Investigation. Appellant was dressed in a sport outfit (R.T. p. 6, lines 1 to 2); he was wearing a sports shirt (R.T. p. 77, lines 1 to 2), and was driving a 1961 Oldsmobile F. 85 compact automobile (R.T. p. 176, lines 13 to 14; p. 71, lines 11 to 13).

Further, both Mr. and Mrs. Reedy stated that appellant was present because of repossessing their father-in-law's vehicle (R.T. p. 6, lines 17 to 20), and further, there was discussion concerning the past attempts to repossess their father-in-law's car for non-payment (R.T. p. 79, lines 19 to 25; p. 83, lines 11 to 14; p. 84, lines 14 to 21; p. 25, lines 1 to 10). Appellant did not exhibit a gun (R.T. p. 17, lines 1 to 2), nor was there any threat of prosecution (R.T. p. 26, lines 15 through 18; p. 27, lines 23 to 25, and p. 28, lines 1 through 11).

The Reedys then stated that they relied on the impression that appellant was a member of the F.B.I. and thus gave him this information. This is contradicted not only by appellant's testimony, but also by the fact that he was invited into the residence before any representations were made (R.T. p. 72, lines 24 to 25; p. 73, lines 1 to 3), and yet the Reedys would not give their father's telephone number to appellant (R.T. p. 86, lines 22 to 24).

The main substantial fact, namely, the identification card, was never even inquired into by the special agent for the Federal Bureau of Investigation (R.T. p. 67).

The factor of identification card was substantially controverted not only by the prosecution's evidence, but also by appellant's evidence, an example of which can be found to the stipulation of the identification card (R.T. p. 10, lines 9 to 23).

Upon appellant's leaving the premises, Mr. Reedy explained that Mr. Whaley was from the Federal Bureau of Investigation, whereupon Mr. Whaley left the residence. This was the entire premise for said conviction.

Two additional cases were brought in for the purpose of showing intention, which matters were objected to on the basis of irrelevancy, immateriality and

remoteness, and which objections were overruled. The first instance took place approximately August 30, 1961, wherein appellant repossessed a boat from a Mr. Gonzales, and the only testimony here was that at one point the appellant told the witness he was from the Federal Bureau of Investigation. The boat had already been repossessed. This witness knew they were repossessing same (R.T. p. 109, lines 13 to 24). There was no reliance hereon, and this testimony was controverted, not only by the defense, but by defense witnesses Eugene B. Swartwood (R.T. p. 184, lines 19 to 21) and by a witness Carl Rosenthal.

Another incident was introduced by a prosecution witness, Mr. Haleen A. Williams, stating that appellant had represented to him that he was from the National City Police Department. This again was re repossessing a car, the witness knew the car was being repossessed. This again was controverted by a defense witness Swartwood and Mr. Andrew Nossal, who is now a member of the Sheriff's Department of San Diego County. At this instance, the San Diego Police Department was called. No arrests were made. That apparently it was felt by the San Diego Police Department that Mr. Williams was not telling the truth.

Further, the appellant and Eugene Swartwood testified that they never had a card bearing the words Federal Bureau of Investigation (R.T. p. 183, lines 7 to 11).

In addition, two witnesses were introduced as character witnesses on behalf of the appellant, Mr James R. Clifton, an employee of the First National Trust and Savings Bank, and Reilly P. Stearns.

In the light of all this evidence, it is the contention of appellant that this evidence was insufficient to warrant a conviction. The motion for dismissal was

made to the court after the prosecution's evidence was introduced, which motion was taken under submission by the Court, and never decided until all the evidence was introduced, at which time the Court then denied the motion.

EVIDENCE OF THE PRIOR ACTS THAT WERE INTRODUCED OVER THE OBJECTIONS OF APPELLANT'S COUNSEL WERE REMOTE, PREJUDICIAL, INCOMPETENT, IRRELEVANT AND IMMATERIAL TO THE ISSUES.

In the first instance (The Gonzales incident) there was no reliance by said witness - he knew it in fact that a repossession was taking place, and there was no similarity to show a common scheme and design, or to show intention.

In the "Williams' incident", it had nothing to do with representations concerning being a member of the Federal Bureau of Investigation. Also, the contrary evidence was so overwhelming that this testimony should not have been allowed into evidence.

III

THE COURT ERRED IN HIS INSTRUCTIONS GIVEN TO THE JURY, WHICH RESULTED IN PREJUDICE TO THE APPELLANT.

The Court gave instructions which, when followed by the jury, would have been contradictions and cannot be reconciled.

At Reporter's Transcript, page 246, lines 16 through 20, the Court states:

"A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey

or disregard the law, may be found to act with specific criminal intent."

Compared to Reporter's Transcript, page 247, lines 15 through 19,

"So good motive alone is never a defense where the act done or omitted is a crime. Motive of the accused is immaterial indeed except insofar as evidence of motive may aid determination of intent or state of mind."

The Court, on the one hand, discussed "intent", and on the other hand discusses the question of "motive". It is also conceded that motive is generally speaking immaterial in a criminal case; however, according to the instructions at Reporter's Transcript, page 246, the court distinctly implies intention and motive to be one and the same thing, and with this, appellant cannot agree.

The court further instructed the jury at Reporter's Transcript, page 251, lines 10 to 24:

"The statute is aimed against false pretense of any office or employment under the United States. Thus it is of no consequence whether the pretender names an existing or a non-existing office or officer, or fails to name, describe or designate accurately the pretended office or employment.

The statute is intended not only to protect innocent persons from actual loss through reliance upon false assumptions of Federal Authority, but also to maintain the good repute and dignity of the Federal Service itself.

> It is no defense to assert that a reasonable person should not have been deceived by the false pretense. The object of the statute is to safeguard the respect due the authority of Federal officers from the most gullible as well as the least credulous." (Emphasis added.)

inferring that a person can be convicted of this crime whether or not he does make a representation or fails to make a representation - that the important thing is the reliance one places upon a set of circumstances, whether reasonably or unreasonably.

It is contended that this instruction is ambiguous and is "catch as catch can". This is certainly not the law. There are many instructions, where persons may arrive at impressions and conclusions, and would not have the right or the privilege to do so. In the instant case, the appellant certainly had no duty to inform the prosecution witness Reedy in the light of all the circumstances that he was not from the Federal Bureau of Investigation. Federal Detective Bureau Inc. vs. U.S., 77 S. Ct. 1296, 354 U.S. 909.

Also, according to the instructions, the court in effect made the jury partisans rather than judges. When the court instructed the jury that the respect of the federal services was to be maintained, it in effect inferred that if the jury were to acquit the appellant, that the good name of the Federal Bureau of Investigation would not be maintained. Such may be the object of the law. However, it is the contention of appellant, that such object should not have been put in the instructions, and was not the function of a jury to consider.

The next instruction which the court gave, and to which appellant objects,

was Reporter's Transcript, page 243, lines 16 through 20:

> "Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence." (Emphasis added.)

The only one who could possibly be affected by the verdict would be appellant, and it is contended that such statement informs that the defendant would be more proneto telling non-truth, and that this would be extremely prejudicial to his case.

Thereafter, the jury, during its deliberation, requested of the Court to define "falsely pretending", which was the CRUX of this case. The Court than instructed the jury by way of example, which can be seen at Reporter's Transcript, page 260, lines 10 through 25; page 261, page 262, page 263 and page 264.

In this instruction, and by way of example, a court in effect stated that a person could be convicted of the herein crime, regardless of any duty that he may have cast upon his shoulders, even though the assumption made by the alleged innocent party was unwarranted. the jury seemed satisfied with this instruction. Thereafter, defense counsel informed the court as to the unreasonableness of his instructions, and the court then recalled the jury and attempted to clear this by a subsequent instruction given (R.T. p. 265 to p. 267). It is contended by the appellant that such manner of giving instruction was erroneous and extremely

prejudicial to the appellant, and was so ambiguous that it cannot be seen by appellant how the jury had any basis on which to arrive at a conclusion.

Respectfully submitted,

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